No. 75-816

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER LUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Petitioner contends that the evidence was insufficient to support his conviction for collecting extensions of credit by extortionate means, since the government failed to establish that there was an "extension of credit" as defined in 18 U.S.C. 891, and that he was denied a fair trial by comments and rulings of the trial court and by allegedly improper prosecutorial argument.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of using extortionate means to collect an extension of credit and on one count of conspiring to do so, in violation of 18 U.S.C. 894. He was sentenced to concurrent terms of ten years' imprisonment on each count. The court of appeals affirmed, in a *per curiam* order (Pet. App. 35-36).

The evidence showed that several individuals who purported to be plain clothes deputy sheriffs entered a

motel room in which Milton West, petitioner, and petitioner's girl friend were in possession of marijuana (Tr. 48-51). Co-defendant Tommy Misco, whom petitioner previously had introduced to West, thereupon purportedly gave the deputy sheriffs $5,000 in return for their agreement not to make any arrests (Tr. 51-56). Misco then informed West that he and petitioner were responsible for repaying him (Tr. 59). When West delayed repayment, Misco threatened him with bodily injury and injury to his reputation; certain of these threats were relayed to West by petitioner (Tr. 62-69, 114-116, 140, 149-151).

1. Petitioner contends that his activities, whether or not extortionate, did not involve an endeavor to collect "the repayment of any extension of credit" as defined in 18 U.S.C. 891(4) to be "the repayment * * * of any debt or claim, acknowleged or disputed, valid or invalid, resulting from * * * that extension of credit." The jury was instructed in terms of this definition (Tr. 578-580). The evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), supported its finding that petitioner attempted to collect from West a portion of the $5,000 which Misco allegedly had given the deputy sheriffs and which Misco claimed that West owed him. Section 894 applies even where the claim arises out of ruse or other fictitious means. See *United States* v. *Keresty*, 465 F.2d 36, 40-41 (C.A. 3), certiorari denied, 409 U.S. 991; *United States* v. *Briola*, 465 F.2d 1018, 1021 (C.A. 10) certiorari denied, 409 U.S. 1108; *United States* v. *Andrino*, 501 F.2d 1373, 1376-1378 (C.A. 9). See also H.R. Rep. No. 1397, 90th Cong., 2d Sess. 31 (1968).

2. Petitioner contends that he was deprived of a fair trial by certain comments and rulings of the trial court and by allegedly improper prosecutorial argument. Since petitioner's counsel failed to object at trial to any of these

alleged improprieties, petitioner was not entitled to raise them on appeal absent plain error. See, *e.g.*, *United States* v. *Russo*, 480 F.2d 1228, 1245 (C.A. 6), certiorari denied, 414 U.S. 1157. None of the incidents about which petitioner complains constituted plain error.

a. In an attempt to establish that Misco had in fact bribed deputy sheriffs, petitioner's counsel asked the government agent who had investigated the case whether he had informed the county sheriff's office that several deputy sheriffs had received a bribe. The court observed that the county sheriff's office had no jurisdiction to conduct police raids within the city of Detroit, where the motel was located. Petitioner's counsel then sought to ask the agent whether narcotics squads were comprised of police officers from various jurisdictions; the court sustained an objection on the ground of relevancy (Tr. 438-444).

Petitioner contends that he was prejudiced by the court's observation and by its ruling sustaining the objection to the follow-up question. However, petitioner introduced no evidence tending to show that Misco had in fact bribed deputy sheriffs and failed to indicate how such a fact, even if shown, could have aided him in his defense; the issue therefore was irrelevant to the question whether petitioner had attempted to extort money from West. Accordingly, the court's observation and ruling did not prejudice him.

b. Petitioner further contends that he was prejudiced when, in response to a leading question of petitioner's counsel, the court advised the jury that "merely asking the question isn't proof of anything unless it's corroboration [sic] from the witness" (Tr. 297). The court's admonition under these circumstances was proper; there is no basis for petitioner's contention that he was prejudiced by it.

c. Petitioner contends that he was prejudiced by the court's *sua sponte* entrapment instruction. The instruction was appropriate, however, since petitioner's counsel had asserted in his closing argument to the jury that petitioner had been "set up" by the FBI (Tr. 560-562).

d. Petitioner contends that he was prejudiced by certain comments made by the government prosecutor in his closing argument. None of the comments to which petitioner refers,[1] however, constituted plain error.

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[1]Petitioner asserts that the prosecutor expressed a personal opinion as to the guilt of the accused by stating (Tr. 567):

> This is not a case of convicting innocent men, of convicting protesters to certain causes, of convicting people against whom the charges have been drummed up, and that happens. Of course it happens and it's reprehensible when it happens. This is no such case. You know it. I know it, and the evidence is in those tapes.

The remark is, however, merely a response to the claim previously asserted by petitioner's counsel that petitioner had been "set up" by the government (Tr. 562, 565).

Second, petitioner complains of two brief references (see Tr. 548, 567) to the crime of which petitioner was charged as being "atrocious." It is unlikely that petitioner was prejudiced by these isolated references. See *Chatman* v. *United States*, 411 F.2d 1139, 1142 (C.A. 9).

Third, petitioner claims that he was prejudiced by the comment of the prosecutor that the evidence of the crime had been gathered in good faith (Tr. 548). The comment, however, did no more than dispute the entrapment theory that petitioner urged.

Finally, petitioner argues that the following comments constituted an attempt by the government to tell the jurors that they had a "duty" to convict:

> Now you have a job. Your job under the facts and circumstances of this case, are [sic] to find these defendants guilty beyond a reasonable doubt. [Tr. 549.]

> This was a carefully contrived, conceived and atrocious crime. To fail to recognize that and to fail to convict these defendants in lieu of these evidences, I submit to you, would be just as atrocious. [Tr. 567.]

These comments do not constitute reversible error. See *Carpintero* v. *United States*, 398 F.2d 488, 490 (C.A. 1); *United States* v. *Stead*, 422 F.2d 183 (C.A. 8), certiorari denied, 397 U.S. 1080.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.